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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

OZZIE MANCINELLI, Plaintiff and Appellant, v. KATHLEEN SIEWAK et al., Defendants and Respondents.	D051591 (Super. Ct. No. GIC805629)

APPEAL from an order of the Superior Court of San Diego County, Patricia Y. Cowett, Judge. Affirmed.

In 2004, plaintiff Ozzie Mancinelli obtained a nearly $1 million judgment against defendants Ferdinand Barlow, Rustie's Unique Designs, Inc. (RUDI), and Kathleen Siewak.[1] In early 2007, Mancinelli (as part of his ongoing efforts to collect on his judgment) served deposition subpoenas on numerous banks, credit card companies and

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1 Pursuant to this court's order of October 6, 2008, and the bankruptcy stay in effect as to Kathleen Siewak, the appeal as to Ms. Siewak is proceeding under case number D053817. Therefore, this appeal does not apply to her, and any reference to Ms. Siewak in this opinion is for information purposes only.

other third parties demanding the production of documents containing the personal financial information of Barlow and others. Barlow moved to quash the subpoenas, and the trial court granted Barlow's motion. Mancinelli timely appealed.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001 Siewak and Barlow hired Mancinelli as chief executive officer for RUDI. In 2003 Mancinelli sued Siewak, Barlow, and RUDI over an employment dispute. The jury ultimately awarded Mancinelli damages of approximately $962,000 against all three defendants, and judgment was entered in May 2004. (*Mancinelli v. Rustie's International, Inc.* (Feb. 5, 2008, D049673) [nonpub. opn.].)

During the next several years, Mancinelli invoked several procedures seeking to collect on the judgment.[2] In the spring of 2007, in the proceedings that give rise to the current appeal, Mancinelli served numerous third parties with subpoenas demanding they

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[2] For example, in October 2005 Mancinelli moved to add Rustie's International, Inc. (RI) as an additional judgment debtor to the judgment against Siewak and RUDI, but not Barlow, based on alter ego liability, on the court's inherent equitable authority, and as a "successor corporation" to RUDI. The court denied the motion, but approximately five months later Mancinelli filed a second motion to amend the judgment to add RI as a judgment debtor based on purported newly discovered evidence. The court denied the second motion, and this court affirmed that ruling on appeal. (*Mancinelli v. Rustie's International, Inc., supra*.) Mancinelli also domesticated the judgment in Florida, where Siewak and Barlow reside, resulting in another lawsuit in which Barlow and Siewak filed an action against Mancinelli seeking to quiet title to certain realty owned by them; and Mancinelli cross-complained in that action, alleging they had transferred assets in fraud of creditors. The Florida litigation was apparently stayed when Siewak filed for bankruptcy, and Mancinelli apparently refiled his claims in an adversary proceeding in the bankruptcy court.

provide Mancinelli with a variety of documents containing information regarding Barlow's financial affairs, including bank account and credit card records.[3]

Barlow moved to quash the subpoenas on both procedural and substantive grounds. Barlow asserted the subpoenas were procedurally defective because they were incomplete, and/or served on the wrong person within the institution, and/or served without adequate notice to Barlow. Moreover, Barlow argued that even if Mancinelli had complied with the technical requirements applicable to ordinary subpoenas, the subpoenas were substantively improper for two reasons. Barlow argued that under the statutory procedures for enforcing money judgments (Code Civ. Proc., §§ 695.010 et seq.),[4] judgment creditors have limited postjudgment discovery procedures to assist in locating assets of the judgment debtor, and document subpoenas to third parties are not among the modes of discovery authorized by the statutory scheme. Second, Barlow argued that even if subpoenas to third parties were otherwise authorized, the scope of the documents sought by Mancinelli invaded the right to privacy of Barlow and of third parties who were not judgment debtors, and because Mancinelli could not demonstrate the requisite compelling state interest to permit the invasion of those privacy rights the court should quash the subpoenas.

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3 Mancinelli sought Barlow's records from American Express, Bank of America, Capital One Services, Capital One Bank/FSB, Chase Bank, Citibank, Citicorp Credit Services, Exxon Mobil, JP Morgan Chase, Providian Bancorp Services, and Sears. Similar records were sought concerning Barlow's codebtor.

4 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Mancinelli opposed the motion to quash the subpoenas, asserting it should be denied on both procedural and substantive grounds. Mancinelli argued the motion was procedurally flawed for untimeliness, for noncompliance with court rules, and for other procedural defects. Mancinelli also argued the motion was substantively meritless because subpoenas may be employed to conduct discovery in postjudgment efforts to collect on a judgment, and Barlow's privacy claims were meritless.

The court ruled the discovery procedures available to pursue the enforcement of money judgments are limited, and the type of subpoenas served by Mancinelli was not authorized under California's statutory scheme. Accordingly, the court granted Barlow's motion to quash, and this appeal followed.

ANALYSIS

A. Business Records Subpoenas May Not Be Employed to Enforce Money Judgments

Mancinelli purported to issue and serve on various institutions a business records subpoena seeking to require the served institution to provide Mancinelli's designated deposition officer with copies of consumer records (within the meaning of § 1985.3 et seq.) at the times and places specified in the subpoenas. Although a business records subpoena is authorized under and governed by the provisions of section 2020.410 through 2020.440 of California's Civil Discovery Act (§ 2016.010 et seq.), the Civil Discovery Act specifically provides that its provisions "appl[y] to discovery in aid of enforcement of a money judgment *only to the extent provided in* [sections 708.010 through 709.030 of the Code of Civil Procedure]." (§ 2016.070, italics added.)

Accordingly, unless a business records subpoena is one of the procedures *provided in* sections 708.010 through 709.030 to pursue collection of a judgment, Mancinelli's attorney did not have authority to issue and serve the instant subpoenas and the motion to quash was properly granted.

The statutory scheme for enforcing money judgments permits a judgment creditor to utilize two procedures provided in California's Civil Discovery Act to obtain discovery. First, the creditor may (subject to certain limitations) propound *to the judgment debtor* written interrogatories in the manner provided by section 2030.010 et seq. of the Civil Discovery Act. (§ 708.020.) Second, the creditor may (subject to certain limitations) demand that *the judgment debtor* produce and permit inspection of documents in the manner provided by section 2031.010 et seq. of the Civil Discovery Act. (§ 708.030.) These are the *only* modes of discovery governed by the Civil Discovery Act "provided [for] in" the enforcement of money judgments provisions, and none of the other modes of discovery (such as written depositions, oral depositions, or requests for admissions--see section 2019.010) are "provided in" sections 708.010 through 709.030.

Mancinelli raises several arguments supporting his claim that a judgment creditor may issue and serve business records subpoenas on third parties. First, he argues a court has the inherent power under section 187 to permit business records subpoenas to be served on third parties as part of a judgment creditor's effort to collect the judgment. He relies on *Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 825, which stated in dicta that courts "have inherent power, as well as power under section 187 of the

Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council. It is not only proper but at times may be necessary for a court to follow provisions of the Code of Civil Procedure which are harmonious with the objects and purposes of the proceeding although those provisions are not specifically made applicable by the statute which creates the proceeding." Even if the quoted language was not dicta, the *Tide Water* court specifically noted the broad authority exists only when "the procedure is not specified by statute." Because the statutory scheme here *does* specify the discovery procedures available to judgment creditors, service of a business records subpoena under sections 2020.410 through 2020.440 cannot be upheld under a court's inherent powers. (*O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 590 ["Under the maxim of *expressio unius est exclusio alterius*, '[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed' "].)

Mancinelli also relies on dicta in *People v. Pereira* (1989) 207 Cal.App.3d 1057 and *Lee v. Swansboro Country Property Owners Assn.* (2007) 151 Cal.App.4th 575 as purportedly affirming the right of a judgment creditor to serve a business records subpoena on third parties in furtherance of the creditor's investigation of the debtor's assets. However, even ignoring that the language relied on by Mancinelli is dicta,[5] the

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5 In *Lee*, the issue was whether the trial court correctly denied the debtor's motion to quash the document subpoena for untimeliness; the appellate court reversed and remanded for reconsideration of the motion to quash on the merits, including claims of

creditors in both cases sought records *from the judgment debtor* (specifically permitted by the statutory scheme under section 708.030), and sought those records *as an adjunct* to a scheduled judgment debtor's examination, which *is* a specifically permitted procedure under section 708.110. (*People v. Pereira, supra,* 207 Cal.App.3d at pp. 1065-1066; *Lee v. Swansboro Country Property Owners Assn., supra,* 151 Cal.App.4th at pp. 581-582.) Mancinelli's business records subpoena, in contrast, did not seek documents *from* Barlow, and it does not appear Mancinelli had a pending debtor's examination scheduled for Barlow.

Finally, Mancinelli cites dicta from *First City Properties, Inc. v. MacAdam* (1996) 49 Cal.App.4th 507 as purportedly approving the service of business records subpoenas on third parties. However, in *MacAdam*, the issue arose because a creditor subpoenaed the records of a third party who claimed to own certain property the creditor asserted was actually owned by the debtor, and the issue on appeal was whether the court properly awarded sanctions against the third party for its unmeritorious motion to quash. (*Id*. at pp. 510-511, 514-517.) Although Mancinelli suggests the *MacAdam* opinion implies business records subpoenas may properly be served on third parties, the enforcement of money judgments provisions specifically permits a creditor to subpoena a third party for

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irrelevance, overbreadth, privacy and privilege. (*Lee v. Swansboro Country Property Owners Assn., supra*, 151 Cal.App.4th at pp. 579-583.) In *Pereira*, the issue was whether false documents, voluntarily produced in response to the subpoena, were " '[offered] in evidence' " for purposes of an indictment charging violation of Penal Code section 132. (*People v. Pereira*, *supra*, 207 Cal.App.3d at pp. 1065-1066.) Indeed, the *Pereira* court noted the debtor there "does not claim that the issuance of a subpoena duces tecum is not legally authorized in a proceeding under the statutory provisions to enforce a judgment" (*id*. at p. 1065), while here, Barlow *does* dispute that issue.

examination under the limited circumstances present in *MacAdam*. (See § 708.120 [court may order third party to appear for examination when creditor files application alleging third party has possession or control of property belonging to debtor].) Because the enforcement of money judgments scheme specifically permits a creditor to compel a third party to appear under these circumstances, and in such proceedings a witness may be "required to appear . . . in the same manner as upon the trial of an issue" (see § 708.130, subd. (a)), a records subpoena to a third party in the circumstances governed by section 708.120 appears proper.[6] However, because those circumstances do not appear to be applicable here, *MacAdam's* dicta does not support Mancinelli's argument in this case.

Because the only modes of discovery governed by the Civil Discovery Act "provided [for] in" the enforcement of money judgments provisions do not include the procedure employed by Mancinelli, the court correctly granted the motion to quash.[7]

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6 Indeed, *MacAdam* seems to contain the seeds of an approach that would permit Mancinelli to obtain some of the materials sought by his subpoenas: pursuit of a judgment debtor's examination under section 708.110, with witness subpoenas under section 708.130 to entities with documents relevant to the issues that will arise in the judgment debtor's examination. However, Mancinelli did not elect to pursue that procedure, and we express no opinion on the extent to which that procedure might yield the documents encompassed by Mancinelli's business records subpoenas issued here.

7 Because of our conclusion, Mancinelli's request that we take judicial notice of various deposition transcripts is denied as moot. The evidence contained in those transcripts is irrelevant to the availability of a business records subpoena to a creditor's effort to enforce a money judgment.

B. Mancinelli's Procedural Objections Do Not Support Reversal of the Order Granting the Motion to Quash

Mancinelli argues the motion should have been denied because it was not filed until after the dates set for several of the document productions, and therefore was untimely. Although section 1985.3, subdivision (g), provides that a consumer whose records are sought "may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum," there is nothing in that language suggesting a court is without jurisdiction to entertain a motion to quash filed after that date. To the contrary, in *Slagle v. Superior Court* (1989) 211 Cal.App.3d 1309, 1312, the court observed "[n]othing in the procedure set forth above suggests that a court lacks jurisdiction to consider a motion to quash if it is brought after the date set forth in the subpoena for production. The time limits mentioned in the procedure for bringing the motion are obviously designed to guide those involved as to when the witness with the records may safely honor or not honor the subpoena when the consumer objects." Although Mancinelli asserts *Slagle* was wrongly decided, the permissive language of subdivision (g), coupled with the absence of any language in either section 1985.3 or 1987.1 stating the time limits for moving to quash are jurisdictional, persuades us the court had jurisdiction to entertain the motion and grant the requested relief.

Mancinelli also asserts the motion to quash should have been denied because it was defective in form for several reasons. First, he asserts it violated California Rules of Court, rule 3.1110(a), because the notice of motion did not state the grounds for issuance of the order *in the first paragraph*. However, Barlow's motion did state the grounds for

the motion in the immediately succeeding sentence of Barlow's Notice of Motion. Mancinelli does not articulate any prejudice from the absence of strict compliance with rule 3.1110, and a court will not reverse a judgment for technical errors that have caused no prejudice to the appellant. (See, e.g., *Starkweather v. Eddy* (1927) 87 Cal.App. 92, 96.) Mancinelli also asserts the motion did not identify all of the papers on which the motion was based, in violation of section 1010, because the motion did not specify Barlow would be relying on the accompanying memorandum of points and authorities and supporting separate statement.[8] However, Mancinelli does not claim the points and authorities or separate statement were not served on him or that he was unaware Barlow would be relying on those documents; to the contrary, Mancinelli's opposition to the motion to quash responded to the arguments and issues raised in those documents. Because these technical errors in form have not prejudiced Mancinelli, we may not reverse based on those errors. (*Starkweather*, at p. 96.) Finally, Mancinelli asserts the separate statement was both defective in form and based on evidence inadmissible for incompleteness and improper authentication. However, because the court's ruling was independent of the precise content and form of the separate statement, and Mancinelli has not articulated how these defects infected the ruling, we may not reverse based on defects that caused Mancinelli no prejudice. (*Ibid.*)

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8 Barlow did identify those documents in the *title* portion of the notice of motion, and Mancinelli's argument is more precisely that Barlow violated section 1010 by not reidentifying those documents in the *text* of the notice of motion.

DISPOSITION

The order is affirmed. Barlow is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.